102

(1) Supreme Court, U.S.
FILED

No. 08-265 AUG 27 2008

OFFICE OF

IN THE

Supreme Court of the United States

KEITH RAYE REED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

JESSIE A. AMOS
Counsel of Record
KATHLEEN KING TANNER
DLA PIPER US LLP
600 Travis Street,
Suite 1700
Houston, Texas 77002
(713) 425-8400

JESSICA P. WANNEMACHER
HOWREY LLP
1111 Louisiana Street,
25th Floor
Houston, Texas 77002
(713) 787-1400

August 27, 2008

Counsel for Petitioner

LEGAL PRINTERS, Washington DC • 202-747-2400 • legalprinters.com

QUESTIONS PRESENTED FOR REVIEW

1. Whether a court may combine the second and third steps set forth in *Batson v. Kentucky*, 476 U.S. 79 (1986), and determine whether Petitioner established purposeful discrimination on the basis of proffered race-neutral explanations without analysis of all the relevant circumstances and explicit adjudication of the credibility of the explanations.

2. In a case in which three African-Americans were tried by a jury with no African-Americans, whether the Fifth Circuit Court of Appeals acted contrary to this Court's decisions by affirming a district court overruling of Petitioner's objections to the Government's use of peremptory strikes based on the race of the defendants, the potential jurors, the prosecutors, the defense counsel, and the court marshals.

PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Supreme Court Rule 14.1(b), Petitioner states that all parties appear in the caption of the case on the cover page.

RULE 29.6 STATEMENT

Petitioner is an individual and has no parents or subsidiaries within the meaning of Supreme Court Rule 29.6.

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

A. The Indictment and Sentence 2

B. Jury Selection and Petitioner's *Batson* Challenge 2

C. The Fifth Circuit Opinion 6

REASONS FOR GRANTING THE WRIT 7

I. A CONFLICT EXISTS REGARDING A DISTRICT COURT'S OBLIGATIONS UNDER *BATSON V. KENTUCKY*. 8

II. A CONFLICT EXISTS REGARDING THE MANNER IN WHICH A COURT DETERMINES A *BATSON* CHALLENGE. 10

III. THE DECISION BELOW CONFLICTS WITH *BATSON V. KENTUCKY* BY COMBINING THE SECOND AND THIRD STEPS OF *BATSON'S* FRAMEWORK. 13

IV. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS BECAUSE THE ONLY STANDARD ARTICULATED FOR OVERRULING THE OBJECTIONS TO THE PEREMPTORY STRIKES WAS AN IMPERMISSIBLE ONE. 16

V. THE FIFTH CIRCUIT DECISION CONFLICTS WITH *SNYDER V. LOUISIANA* BY CHOOSING BETWEEN PERMISSIBLE AND IMPERMISSIBLE REASONS FOR OVERRULING A *BATSON* CHALLENGE. 21

CONCLUSION 23

COURT OF APPEALS OPINION A-1

COURT OF APPEALS JUDGMENT A-17

ORDER DENYING REHEARING A-19

TABLE OF AUTHORITIES

Page(s)

CASES

Avery v. Georgia,
345 U.S. 559 (1953) 9

Barnes v. Anderson,
202 F.3d 150 (2d Cir. 1999).....11, 12

Batson v. Kentucky,
476 U.S. 79 (1986) 7, 9-11, 14, 15, 19

Georgia v. McCollum,
505 U.S. 42 (1992) 8, 9

Hernandez v. New York,
500 U.S. 352 (1991) 13

Hightower v. Terry,
459 F.3d 1067 (11th Cir. 2006),
cert. denied, 127 S. Ct. 2254 (2007) 12

Johnson v. California,
545 U.S. 162 (2005) 19, 20

Jordan v. Lefevre,
206 F.3d 196 (2d Cir. 2000).....17

Miller-El v. Dretke,
545 U.S 231 (2005) 10, 14-16, 19, 20

Paulino v. Castro,
371 F.3d 1083 (9th Cir. 2004) 17

Powers v. Ohio,
499 U.S. 400 (1991) 9

Purkett v. Elem,
514 U.S. 765 (1995) 15

Rice v. Collins,
546 U.S. 333 (2006) 19

Riley v. Taylor,
277 F.3d 261 (3d Cir. 2001).....14

Snyder v. Louisiana,
128 S. Ct. 1203 (2008) 10, 13, 19-22

Swain v. Alabama,
380 U.S. 202 (1965) 15

United States v. Alvarado,
923 F.2d 253 (2d Cir. 1991).....10, 11, 13, 18

United States v. Edouard,
485 F.3d 1324 (11th Cir. 2007) 12, 14

United States v. Gatling,
96 F.3d 1511 (D.C. Cir. 1996) 17

United States v. Torres-Ramos,
No. 06-3580, 2008 U.S. App. LEXIS 16621
(6th Cir. Aug. 7, 2008).....16, 20

STATUTES

18 U.S.C. § 922(g)(1) 2, 6

18 U.S.C. § 924(a)(2) 2, 6

18 U.S.C. § 924(e)(1) 2

CONSTITUTIONAL PROVISION

U.S. CONST. amend. V 1

PETITION FOR A WRIT OF CERTIORARI

Petitioner Keith Raye Reed respectfully petitions the Court for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is unreported and is included in the Appendix at App. A-1 through A-16. The order of the court of appeals denying the petition for rehearing is unreported and is included in the Appendix at A-19. The judgment of conviction of the United States District Court for the Southern District of Texas is unreported.

JURISDICTION

The court of appeals entered an opinion and judgment on May 1, 2008, and, on May 28, 2008, issued a revised opinion filed as of May 1, 2008. Petitioner timely filed a petition for panel rehearing. The order denying the petition was filed on May 29, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

STATEMENT OF THE CASE

A. The Indictment and Sentence

Petitioner Keith Raye Reed, an African-American, was charged by a superseding indictment as a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and 924(a)(2), with a notice of a sentence enhancement as an armed career criminal under 18 U.S.C. § 924(e)(1). Along with his African-American co-defendants Larry Patrick Bushnell and Eric Jerrod Bolden,[1] Petitioner proceeded to a jury trial on November 30 and December 1, 2004.

At the close of the evidence, the jury was instructed, as to Petitioner, on constructive possession of a firearm, that is, knowingly having the power and intention to exercise control over the firearm. The jury found Petitioner guilty. The district court sentenced Petitioner on August 15, 2005, imposing a 212-month sentence to be followed by five years of supervised release.

B. Jury Selection and Petitioner's *Batson* Challenge

The jury was chosen on November 30, 2004. After one potential juror was struck for cause, a panel of thirty-nine potential jurors remained. The Government was allowed ten peremptory strikes; defendants collectively were allowed fifteen strikes.

---

[1] A fourth African-American defendant, Larry James Solomon, pleaded guilty to the charges of felon in possession of firearms shortly before trial. Solomon testified at the trial, including testifying that he owned the firearm on which Petitioner's conviction is based.

After the parties exercised their strikes, no African-Americans remained on the jury panel that tried the case.

The district court conducted the *voir dire*, for the most part directing questions to the potential jurors as a group. During the questioning, the court asked whether any potential juror "had a crime experience from which they can't separate these officers and these individuals?" Juror number 13 responded:

> Thinking on the previous question, my residence was broken into and they stole . . . a lot of gifts and stuff. And some of the stuff I'm still paying for and I was never able to retrieve it. . . . And the thing that irritated me the most is that . . . Harris County showed up several hours later to do the investigation.

The district court then asked, "None of these witnesses is a deputy sheriff, but there may be a deputy constable. But you need to tell me, can you separate that experience from these people here today, none of whom had anything to do with that?" Juror number 13 answered, "Yes, sir, I believe I could." Later in *voir dire*, the court asked, "How many of you are sitting there saying there is a really good reason I shouldn't be a juror in this case . . . ?" Juror number 9 answered:

> I am self-employed and I worked for a job 29 years and retired. Before then, I didn't have a problem coming because I turned in—yesterday—like, yesterday, I came in

> they said, "Well, we don't really need you today so you can go back home." That's two days consecutive that I don't—I don't make money.

When the questioning ended, five African-Americans were stricken from the panel of potential jurors. The Government used two of its ten peremptory challenges to strike jurors numbers 9 and 13, two African-American males. After the panel for trial was announced, all defendants—including Petitioner—asserted a *Batson* challenge to these two strikes. The district court did not state that defendants had made a *prima facie* showing that the peremptory strikes were based on race, but did ask the Government to state its reasons for the strikes. In response, as to juror number 9, the Government stated, "The Government believed that [he] . . . stated that he didn't really want to be here because he wanted to – he was missing work and we struck him because of that reason." As to juror number 13, the Government stated that he was struck because "[h]e's the guy that said that he had the problem with the Harris County Sheriff's officers; and if there were going to be officers testifying, he would have a problem; and I struck him because of that issue with police officers." After the Government stated its reason for striking juror number 13, Bolden's counsel stated, "Okay." The district court asked, "And any others?" Bolden's counsel answered, "That's all." The court then stated "[o]verruled" and dismissed the potential jurors who were not on the jury panel for trial.

Petitioner and his two co-defendants, all African-Americans, proceeded to trial with a jury

that included no African-Americans. After the Government presented its evidence and rested, the district court excused the jury and returned to the objections to the Government's peremptory strikes. Addressing Bolden's counsel:

> THE COURT: Quickly, before I forget about it, . . . you wanted to elaborate your objection to the Government's use of their peremptories?
>
> [Bolden Counsel]: Just briefly to clarify the record, that the jury panel had no African Americans and that—
>
> THE COURT: That's not a question.
>
> [Bolden Counsel]: Oh.
>
> THE COURT: There were black venire men. And the five jurors whom we discussed, if I recall correctly, were all black. The Defendants are black. The two prosecutors are black. What else do we need?
>
> [Bolden Counsel]: Nothing.
>
> THE COURT: Okay.
>
> [Bolden Counsel]: And—

THE COURT: And one of them was a woman. Pardon.

[Reed Counsel]: One defense lawyer is black.

THE COURT: And one of the defense lawyers. And one of the marshals is black.

All right. I mean, I want to get it on the record.

The district court's statement that the court wanted "to get it on the record" ended the exchange.

After this exchange, defendants, including Petitioner, made their motions for acquittal, which were denied. The trial proceeded. The jury found Petitioner guilty of constructively possessing a firearm in violation of 18 U.S.C. § 922(g)(1) and 924(a)(2).

C. The Fifth Circuit Opinion

After the district court entered its judgment of conviction and sentence, Petitioner timely perfected his appeal to the Fifth Circuit. On appeal, Petitioner raised several issues, including claims that the Government's striking potential jurors who were African-American in violation of *Batson* and the district court's failure to adhere to the *Batson* framework was clear error. With minimal analysis, the Fifth Circuit concluded that Petitioner's *Batson* contentions lacked merit. The appellate court wrongly regarded Bolden's counsel's "[o]kay" and

"[t]hat's all" as a concession. According to the Fifth Circuit, with this "concession and with no additional evidence of discrimination, the district court's overruling of the *Batson* motion adequately conveyed its decision" that Petitioner did not prove purposeful discrimination. App. at A-16.

The Fifth Circuit additionally concluded that Petitioner could not challenge the district court's *Batson* ruling on the basis of the court's statements about the race of the prosecutors, the defendants, and the panel of potential jurors because "the district court had long concluded the *Batson* analysis and overruled the motion." App. at A-16. According to the Fifth Circuit, Petitioner's claim that the jury panel had no African-Americans came too late. App. at A-16. The court affirmed Petitioner's conviction.

Petitioner timely sought a panel rehearing of the Fifth Circuit's affirmance. On May 28, 2008, the court of appeals issued a revised opinion, filed as of May 1, 2008, to correct an incorrect trial date in the initial opinion. On May 29, 2008, the court denied the petition for panel rehearing. This Petition for a Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

This case presents the Court with the opportunity to resolve a conflict among circuits regarding application of the three-step framework set forth in *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny. By granting *certiorari*, this Court may set forth and reinforce the necessity of applying the *Batson* framework correctly to ensure that the

rights of each defendant are recognized and protected.

The Petition for Writ of Certiorari should be granted for three primary reasons. *First*, the decision below conflicts with that of other circuits regarding how a court applies the third step of the three-step framework. *Second*, the decision below runs afoul of, and conflicts with, *Batson* and its progeny. *Third, the* record demonstrates that the court used an impermissible and fabricated standard to make its determination. The record does not demonstrate that the court met its obligation under *Batson* to engage in the required analysis to determine that Petitioner failed to show purposeful discrimination. This matter presents the Court with an ideal opportunity to examine more fully what is required under the third step of the three-step *Batson* inquiry and confirm that a lower court may not substitute its own standard for the standard set forth by this Court in *Batson*. A correct resolution of this case, therefore, has significance for all cases in which a defendant raises an objection under *Batson*.

I. A CONFLICT EXISTS REGARDING A DISTRICT COURT'S OBLIGATIONS UNDER *BATSON V. KENTUCKY*.

In a line of decisions spanning more than 100 years, this Court has consistently recognized that a defendant has a right to be tried by a jury whose members are selected by nondiscriminatory criteria. *Georgia v. McCollum*, 505 U.S. 42, 46-47 (1992). Because racial discrimination by the Government in the jury selection process offends the equal protection provisions of the United States

Constitution, this Court has set limits on the exercise of peremptory challenges. A criminal defendant, including Petitioner, has the constitutional right to trial by a jury that is not chosen in a racially discriminatory manner. Petitioner "has the right to an impartial jury that can view him without racial animus . . . ." *McCollum*, 505 U.S. at 58.

In *Batson*, this Court once again recognized "that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Batson*, 476 U.S. at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)). To guard against such discrimination, the Court articulated a three-step framework to protect a defendant from discrimination by the use of peremptory challenges in the selection of jurors. *Powers v. Ohio*, 499 U.S. 400, 402 (1991). Absent correct application of the *Batson* framework, this protection is not provided because the Government may use its peremptory strikes in a racially discriminatory manner.

In *Batson*, this Court set forth a three-step framework that a court must use in determining whether a prosecutor exercised a peremptory strike in a discriminatory manner. Following a defendant's objection, the court first must determine whether the defendant has made a *prima facie* showing that the peremptory strike was based on race. Second, if the defendant satisfies this step, the prosecutor must articulate a race-neutral explanation for striking the juror. At the third step, the district court must evaluate the prosecutor's race-neutral explanation and determine whether the defendant has

established purposeful discrimination. *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005); *Batson*, 476 U.S. at 96-98. This is the only standard by which a district court or court of appeals may examine claims of discrimination in the selection of a jury. This Court resolutely stands by the three-step *Batson* framework. *Snyder v. Louisiana*, 128 S. Ct. 1203, 1212 (2008).

Certiorari is warranted in this case because the Fifth Circuit decision conflicts with the decisions of other circuits regarding the adequacy of a court's determination of a *Batson* challenge. The Fifth Circuit decision also conflicts with this Court's decisions by affirming a resolution of a *Batson* challenge that improperly combines the steps of the three-part inquiry and that accepts an impermissible standard for resolving the challenge. The Fifth Circuit misapplied *Batson* and its progeny and affirmed the district court's overruling of Petitioner's *Batson* challenge in the absence of the analysis that *Batson* requires and based on an improper standard of the district court's own fabrication.

II. A CONFLICT EXISTS REGARDING THE MANNER IN WHICH A COURT DETERMINES A *BATSON* CHALLENGE.

In concluding that the district court's statement "[o]verruled" was sufficient, the Fifth Circuit decision conflicts with decisions of the Second Circuit Court of Appeals and the Eleventh Circuit Court of Appeals. The Second Circuit concluded that denial of a *Batson* challenge without an explicit adjudication of the credibility of the non-movant's racially neutral explanations is error. *United States*

v. Alvarado, 923 F.2d 253, 256 (2d Cir. 1991); *see Barnes v. Anderson*, 202 F.3d 150, 156 (2d Cir. 1999) (concluding that the district court erred in its application of *Batson* "without explicit adjudication of the credibility of the . . . race-neutral explanations for the challenged strikes"). In *Alvarado*, the prosecution stated its explanations for striking four minority individuals from the group of potential jurors. 923 F.2d at 255. The magistrate, the judicial officer overseeing the jury selection, accepted the explanations for two of the strikes as race-neutral, made no determination for the other two strikes, and rejected the defendant's *Batson* claim. *Id.* The district court did not clarify whether its rejection was based on the defendant's failure to establish *prima facie* discrimination or the failure to prevail in establishing discriminatory intent. *Id.* The court provided no analysis or weighing of relevant circumstances for two of the defendant's claims to the prosecutor's peremptory strikes or for the claims as a whole.

The Second Circuit considered the adequacy of the court's ruling on the *Batson* claim and found the ruling inadequate. *Id.* "The task of assessing the prosecutor's explanations, in order to determine the ultimate issue of whether discrimination has been shown, falls primarily upon the judicial officer conducting the jury selection, whose determinations as to the credibility of the proffered explanations are entitled to 'appropriate deference.'" *Id.* at 256 (citing *Batson*, 476 U.S. at 98 n.21). Absent any explanation, the district court did not fulfill its task to determine the ultimate issue under the third step of *Batson*. The Second Circuit vacated the district court judgment. *Id.*

The court followed *Alvarado* with the decision in *Barnes*. The court concluded that, given the district court's several varied comments on defendant's *Batson* objections, the district court "committed the precise error discussed in *Alvarado*: denial of a *Batson* motion without explicit adjudication of the credibility of the non-movant's race-neutral explanations for the challenged strikes." *Barnes*, 202 F.3d at 156-57. The Second Circuit has determined that an explicit adjudication of a *Batson* challenge is necessary.

More recently, the Eleventh Circuit Court of Appeals has adhered to the necessity of an explicit adjudication of the credibility of the non-movant's explanations as the proper application of *Batson*. *United States v. Edouard*, 485 F.3d 1324, 1342-43 (11th Cir. 2007). In *Edouard*, the district court overruled objections to two of the prosecutor's strikes, stating reasons for those decisions. *Id.* at 1342. The court, however, summarily overruled objections to other strikes without stating the reasons for the decisions. *Id.* In addressing the defendant's claims on appeal, the Eleventh Circuit noted "that the district court improperly condensed the second and third steps of the *Batson* inquiry by summarily overruling [defendant's] objections and/or failing to consider whether [defendant] had refuted the race-neutral explanations proffered by the Government." *Edouard*, 485 F.3d at 1343.[2]

---

[2] Some guidance regarding what a court must articulate about its ruling on an objection to a peremptory strike is necessary. In *Hightower v. Terry*, 459 F.3d 1067, 1072 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 2254 (2007), the Eleventh Circuit Court of Appeals concluded that it could determine that a trial court implicitly found that a prosecutor's race-neutral reasons were

Here, as in *Edouard*, *Alvarado*, and *Barnes*, the district court summarily overruled or rejected the *Batson* challenges. Unlike the Second and Eleventh Circuits, the Fifth Circuit concluded that the district court's overruling the challenge, absent analysis, was sufficient. The Fifth Circuit decision, therefore, conflicts with the decisions of the Second and Eleventh Circuits. As the Second Circuit correctly stated in *Alvarado*, at the third step under *Batson*, a court must determine whether purposeful discrimination has been shown. The analysis at this step compels a court to determine "the credibility of the proffered explanations." *Alvarado*, 923 F.2d at 256. Despite the importance of the third step of *Batson*, the Fifth Circuit concluded that "the district court's overruling of the *Batson* motion adequately conveyed its decision that [Petitioner] had failed to prove purposeful racial discrimination . . . ." App. at A-16. This conclusion conflicts with decisions of other circuit courts of appeals.

III. THE DECISION BELOW CONFLICTS WITH *BATSON V. KENTUCKY* BY COMBINING THE SECOND AND THIRD STEPS OF *BATSON'S* FRAMEWORK.

In this case, the *Batson* issue as addressed by the Fifth Circuit centered on the third step of the *Batson* framework because the Government stated its race-neutral explanations for striking the two jurors. *Hernandez v. New York*, 500 U.S. 352, 359 (1991). Under the third step of *Batson*, a court has

---

credible to complete the third step of *Batson*. *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008), demonstrates the need to articulate a proper reason for denying an objection to a peremptory strike.

"'the duty to determine if the defendant has established purposeful discrimination.'" *Miller-El*, 545 U.S. at 239 (quoting *Batson*, 476 U.S. at 98). "As for law, the rule in *Batson* . . . requires the judge to assess the plausibility of [the prosecution's] reason in light of all the evidence with a bearing on it." *Miller-El*, 545 U.S. at 251-52. The third step of the inquiry is the critical "ultimate determination on the issue of discriminatory intent based on *all* the facts and circumstances" and, therefore, cannot be a rubber-stamping of any supposedly race-neutral reason that the Government offers. *Riley v. Taylor*, 277 F.3d 261, 287 (3d Cir. 2001).

The Fifth Circuit decision misapplies and, thus, conflicts with *Batson*. The Fifth Circuit summarily concluded that "the district court's overruling of the *Batson* motion adequately conveyed its decision that [Petitioner] had failed to prove purposeful racial discrimination . . . ." App. at A-16. For its part, the district court summarily stated "[o]verruled" after the Government stated its explanations for striking jurors numbers 9 and 13. This procedure of merely stating that Petitioner's objections under *Batson* were overruled, absent any analysis, is contrary to the law.

This procedure, which the Fifth Circuit allowed and approved, improperly combines the second and third steps of the *Batson* framework. *See Edouard*, 485 F.3d at 1343 (noting that the district court improperly condensed the second and third steps of the Batson inquiry by "summarily overruling [defendant's] objections and/or failing to consider whether [he] had refuted the race-neutral explanations proffered by the Government"). The

Batson framework requires two separate and independent steps. At the second step, the Government has the burden to proffer a race-neutral reason for a peremptory strike. At the next and third step, after the Government proffers its reason, the district court has the duty to decide if the strike's opponent has proved purposeful discrimination.

The district court's duty does not end once the Government offers a race-neutral reason for a peremptory strike. *Batson* requires the court to look beyond the proffered reason and determine whether the reason is a pretext for intentional discrimination. *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995); *Batson*, 476 U.S. at 96-98. As this Court recognized in *Miller-El*, a prosecutor's facially neutral reason does not resolve a *Batson* challenge. "If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain* [*v. Alabama*, 380 U.S. 202 (1965)]." *Miller-El*, 545 U.S. at 240. A court must proceed beyond a facially neutral reason to determine, for example, if the reason is a pretext for striking a remaining African-American from a group of potential jurors. The court's analysis should involve examination of relevant evidence that is available to the court and consideration of the proffered reason in light of the surrounding circumstances. *Miller-El*, 545 U.S. at 251-52; *Batson*, 476 U.S. at 96-97. The relevant evidence may include the effect of the strikes on the composition of the jury panel and comparison of excluded minority persons to non-excluded, non-minority persons.

In this case, the required analysis was completely lacking. Petitioner's *Batson* challenge

was determined at the second step under *Batson* with the Government's proffer of race-neutral explanations for striking jurors numbers 9 and 13. The reasons proffered were that juror number 9 stated he did not want to be at the court because he was missing work, and that juror number 13 said that he had a problem "with the Harris County Sheriff's officers; and if there were going to be officers testifying, he would have a problem." Juror number 13, however, did not state that he had a problem with the officers testifying. He stated that he believed that he could separate his experience with the Harris County officers from the testifying officers. The district court proceeded no further and accepted the Government's proffered reasons on their face without determining whether purposeful discrimination was shown. This is error. *Miller-El*, 545 U.S. at 239-40; *United States v. Torres-Ramos*, No. 06-3580, 2008 U.S. App. LEXIS 16621 **43-46 (6th Cir. Aug. 7, 2008). Because any analysis of the proffered reasons was lacking and the Fifth Circuit combined steps two and three of the *Batson* framework, the Fifth Circuit decision conflicts with *Batson* and its progeny.

IV. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS BECAUSE THE ONLY STANDARD ARTICULATED FOR OVERRULING THE OBJECTIONS TO THE PEREMPTORY STRIKES WAS AN IMPERMISSIBLE ONE.

The district court initially stated that it was overruling Petitioner's challenge to the Government's peremptory strikes without any

analysis of the Government's proffered reasons in light of the circumstances. The district court then revisited the *Batson* challenge after the Government rested its case. In response to the court's statement or question about elaborating on the objection to the Government's strikes, defense counsel pointed out the absence of African-American jurors. The court interrupted defense counsel. The court did not allow counsel to elaborate on the objection or explain the significance of the challenges to jurors numbers 9 and 13.[3] The court's resistance of counsel's efforts to make an argument regarding the peremptory strikes precluded a meaningful inquiry under *Batson*. *Jordan v. Lefevre*, 206 F.3d 196, 201 (2d Cir. 2000); *see Paulino v. Castro*, 371 F.3d 1083, 1089-90 (9th Cir. 2004) (concluding that a process in which a trial court did not permit defense counsel to explain the objection and interjected the court's speculation about why the prosecutor struck potential jurors "clearly contravened the procedure outlined in *Batson*").

After interrupting counsel, the district court stated its reason for overruling Petitioner's *Batson* challenge, "There were black venire men. And the five jurors whom we discussed . . . were all black. The Defendants are black. The two prosecutors are black. . . . And one of the defense lawyers. And one of the marshals is black." These statements are the

---

[3] Given that Bolden's counsel could not move forward with the argument in support of all defendants' *Batson* challenges, Petitioner's counsel had no opportunity to expand on the argument on Petitioner's behalf. *See United States v. Gatling*, 96 F.3d 1511, 1521 (D.C. Cir. 1996) (concluding that an objection raised by one defendant may be preserved for other defendants).

only reason that the court articulated for overruling Petitioner's objections to the Government's peremptory strikes. However, the race of persons present in the courtroom is not "a circumstance weighing against a finding of discrimination." *Alvarado*, 923 F.2d at 256 n.3. The district court, therefore, based its determination on an impermissible standard.

The Fifth Circuit wrongly upheld this standard by concluding that the district court's comments were irrelevant to its analysis because they were made after "the district court had long concluded the *Batson* analysis and overruled the motion." App. at A-16. This resolution of Petitioner's claim ignores the fact that **the district court** returned to and reopened the *Batson* question. The district court's analysis, therefore, had not concluded. In fact, the court "want[ed] to get it on the record." The Fifth Circuit's resolution also ignores the fact that the district court did not engage in any meaningful analysis of Petitioner's *Batson* challenge. The Fifth Circuit's silence gives implied credence to the district court's ability to fashion a standard that is qualitatively different from the one set forth by this Court in *Batson* and its progeny. Thus, the Fifth Circuit decision conflicts with decisions of this Court.

A court may not disregard *Batson's* mandate and apply the court's own standard to determine whether purposeful discrimination in jury selection is shown. Having reached the third step of *Batson*, the district court was required to determine whether Petitioner established purposeful discrimination in the Government's striking jurors numbers 9 and 13.

The court was to consider all relevant circumstances before ruling on Petitioner's objections to the use of peremptory strikes as to jurors numbers 9 and 13. The court may have considered a pattern of strikes against African-American jurors or may have compared jurors numbers 9 and 13 to non-minority jurors who were not struck. *Snyder*, 128 S. Ct. at 1208; *Miller-El*, 545 U.S. at 252; *Batson*, 476 U.S. at 96-97. The court apparently considered neither. Rather, the court based its determination on the race of persons present in the courtroom, including potential jurors struck from the jury, the prosecutors, the defense counsel, and the marshals. The district court formulated and applied an improper standard. The Fifth Circuit adopted this formulation.

Formulation and application of an improper standard to determine purposeful discrimination in jury selection requires reversal. *Johnson v. California*, 545 U.S. 162, 168 (2005). In *Johnson*, this Court concluded that the California court's "'more likely than not'" standard in determining whether a defendant made a *prima facie* case of discrimination was "at odds with the *prima facie* inquiry mandated by *Batson*." *Id.* at 173 (italics added). Use of the at-odds standard required reversal. *Id.*

Shortly after its decision in *Johnson*, this Court reversed a judgment based on a court of appeals' use of an improper standard to evaluate a state court's conclusion regarding the third step of the *Batson* inquiry. *Rice v. Collins*, 546 U.S. 333, 342 (2006). Although involving the standard of review in a habeas proceeding, the decision in *Rice* demonstrates that a court cannot substitute and use

its own standard when this Court has set forth the standard for considering an issue. *Rice* and *Johnson* unequivocally require that a lower court must apply the correct *Batson* standard and not substitute a standard of the court's own making.

The result can be no different in this case. In this case, a wholly new and impermissible standard was created and applied. The district court analyzed and determined Petitioner's objection based on an irrelevant cataloguing of the race of persons present in the courtroom. *Batson* requires that a court assess the plausibility of the proffered reason in light of all relevant evidence, including all of the circumstances that bear on the issue of racial animosity. *Snyder*, 128 S. Ct. at 1208; *Miller-El*, 545 U.S. at 239. The factors on which the lower court relied are not part of the *Batson* framework. *See Torres-Ramos*, 2008 U.S. App. LEXIS 16621 at *39 (concluding that the district court misapplied the controlling legal standard by comparing excluded jurors to each other rather than comparing jurors who were struck with those who were not). *Johnson* requires that a court adhere to the proper standard at each step of the three-part *Batson* inquiry. 545 U.S. at 173. The Fifth Circuit decision conflicts with *Batson* and *Johnson* by applying a standard that is at odds with that set forth in *Batson*. The fundamental teaching of *Johnson* is that a court may not apply its own standard: *Batson* controls.

V. THE FIFTH CIRCUIT DECISION CONFLICTS WITH *SNYDER V. LOUISIANA* BY CHOOSING BETWEEN PERMISSIBLE AND IMPERMISSIBLE REASONS FOR OVERRULING A *BATSON* CHALLENGE.

The Fifth Circuit decision conflicts with this Court's recent decision in *Snyder*. The Fifth Circuit regarded the district court's comments on the race of persons present in the courtroom as irrelevant because, as the Fifth Circuit concluded, the district court had already overruled Petitioner's objections. App. at A-16. The Fifth Circuit also concluded that the district court's "[o]verruling" of Petitioner's *Batson* challenge "adequately conveyed" the decision that Petitioner failed to prove purposeful discrimination. App. at A-16. The Fifth Circuit apparently regarded the "[o]verruling" as based on a permissible standard for analyzing and determining Petitioner's *Batson* challenge. Even if the Fifth Circuit were correct in this regard, the court ran afoul of *Snyder*. The district court articulated a separate and impermissible standard on which to base the decision to overrule Petitioner's challenge on the record. Under *Snyder*, the Fifth Circuit cannot choose one standard over another.

In *Snyder*, this Court found purposeful discrimination based on the determination that one of two race-neutral reasons offered by the prosecution for striking a juror was pretextual. In that case, the prosecution eliminated all five African-American jurors through peremptory strikes. *Snyder*, 128 S. Ct. at 1207. The prosecution offered two reasons for striking one of the potential jurors:

his alleged nervousness during *voir dire* and his student-teaching commitments. *Id.* at 1208. The state trial court overruled the defendant's *Batson* objection without stating upon which of the two reasons the court relied. *Id.* This Court concluded that the second explanation, the student-teaching commitment, was not credible because the prosecution accepted white jurors with similar commitments. *Id.* at 1209. In the absence of any showing that the peremptory strike rested on the juror's nervousness, this Court reversed the judgment. *Id.* at 1212. The prosecution's explanation that the juror was nervous did not "save" the strike from the defendant's *Batson* motion. The Court clarified that a *Batson* motion cannot be defeated by recitation of a non-discriminatory reason for a strike without a demonstration that the strike rests "in substantial part" on that non-discriminatory reason. *Id.*

In this case, the district court record indicates two possible bases for the district court ruling on Petitioner's *Batson* challenge: a summary acceptance of the Government's proffered reasons with the one word "[o]verruled" and the race of persons present in the courtroom. To comply with *Snyder* and the *Batson* framework, the record must demonstrate that the district court's determination rests on the proper standard for determining that Petitioner did or did not establish purposeful discrimination. The record does not and cannot show that the court "determined" whether purposeful discrimination was shown based on a proper standard. Following *Snyder*, the Fifth Circuit could not affirm the district court's overruling of the

Batson challenge in the face of the court's stating an improper standard on the record.

The district court did not articulate a proper reason for overruling Petitioner's *Batson* challenge. To the contrary, the court articulated an impermissible standard. Neither a blind acceptance of the Government's proffered race-neutral explanations without a meaningful analysis nor a racial tally of non-jurors present in the courtroom is a proper standard because neither complies with *Batson*.

CONCLUSION

For all of the foregoing reasons, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

JESSIE A. AMOS
Counsel of Record
KATHLEEN KING TANNER
DLA PIPER US LLP
600 Travis Street,
Suite 1700
Houston, Texas 77002
(713) 425-8400

JESSICA P. WANNEMACHER
HOWREY LLP
1111 Louisiana Street,
25th Floor
Houston, Texas 77002
(713) 787-1400

August 27, 2008

Counsel for Petitioner

REVISED MAY 28, 2008
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-20712

[DATE STAMP]
United States Court of Appeals
Fifth Circuit
FILED
May 1, 2008
Charles R. Fulbruge III
Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KEITH RAYE REED,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:04-CR-429

Before KING, WIENER, and ELROD, Circuit Judges.

PER CURIAM:*

---

*Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

A jury found Keith Raye Reed guilty of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2). As an armed career criminal under 18 U.S.C. § 924e(1), he was sentenced by the district court to 212 months in prison followed by five years of supervised release. He appeals his conviction and sentence, challenging the sufficiency of the evidence, the district court's admission of a statement he made to an arresting officer, and the denial of his *Batson* motion. For the reasons discussed below, we affirm.

I. Background

Reed and two co-defendants, Eric Bolden and Larry Bushnell, were tried before a jury on November 30 and December 1, 2004. A third co-defendant, Larry Solomon, pleaded guilty the day before trial.

A. Jury Selection and the Batson *Challenge*

During jury selection, five African-American jurors were struck from the venire panel. The government struck two; the record does not indicate who struck the other three. After the announcement of the petit jury panel, defense counsel made a joint *Batson* challenge to its composition. The government responded by stating that one of the African-American venire members had indicated that "he didn't really want to be here because ... he was missing work" and that the other had said that "he had a problem with the Harris County Sheriff's officers ...." Thereafter, defense counsel responded, "[o]kay"; the court asked if there were any other challenged strikes; and after

defense counsel said, "[t]hat's all," the court overruled the *Batson* motion.

Later at trial, following the government's case-in-chief, Bolden's counsel clarified for the record that "the jury panel ha[d] no African-Americans .... " The district court remarked that "[t]here were black venire men. And the five jurors whom we discussed ... were all black. The defendants are black. The two prosecutors are black. What else do we need?" Bolden's counsel replied, "[n]othing," and the court said, "[o]kay."

B. The Evidence Admitted at Trial

At trial, Reed stipulated that he was a convicted felon and that the firearm in question had traveled in interstate commerce. Therefore, the only issue was whether he possessed the firearm. To prove this element, the government called Rolanda Bushnell, Officers Pat Siddons and Preston Moore, and a fingerprint examiner, Michael Salvidar.[1]

Rolanda Bushnell testified that on June 21, 2004, she parked a rented jeep at her residence where her brother, Larry Bushnell, and the other co-defendants were present. According to Rolanda Bushnell, the vehicle contained no firearms when she left the keys in it, and she did not drink Crown Royal. At some point that afternoon, Reed, Larry Bushnell,

---

[1]Salvidar testified generally about the ability to lift fingerprints from firearms and about his inability to lift any identifiable prints in this case.

Bolden, and Solomon borrowed the jeep.

Meanwhile, Officer Siddons testified that around 6:00 p.m. that same day, he responded to an incident in the Fifth Ward area of Houston, Texas. There he stopped a jeep that was speeding toward him by blocking its path and pointing his weapon at the occupants. Officer Moore arrived on the scene less than a minute thereafter.

Siddons further testified that after the jeep stopped, he instructed the four occupants to raise their hands. The driver, Bolden, and the front-seat passenger, Reed, did not immediately comply. Instead, they both "dropped their hands down into the floor board area of the vehicle." Only after Siddons repeatedly demanded that the two men raise their hands did they comply.

According to Siddons, after back-up officers arrived one or two minutes later, Reed was removed from the jeep, handcuffed, and placed in the back of Siddons's patrol car. Upon taking Reed into custody, Siddons discovered a "blue velvet Crown Royal bag that was in plain view in the [front] passenger floor board area" near Reed's feet. Inside the bag was a .357 revolver. Siddons placed both the revolver and the Crown Royal bag in Moore's patrol car.[2]

Siddons found three additional firearms on the floor board in the back seat of the jeep – one on the

---

[2]The Crown Royal bag was not produced at trial.

rear floor board near Larry Bushnell (who was sitting behind Reed) and the other two on the rear floor board near Solomon (who was sitting behind Bolden). Moore testified that he found a fifth firearm on the front floor board on the driver's side where Bolden was seated. All of these weapons were placed in Moore's patrol car.

On redirect examination, Siddons testified that after Reed was removed from the jeep, Reed told him that "he had just been robbed and that he was trying to keep the other guy from killing him – or keeping the other guy from killing a person." Reed's defense counsel objected to the admission of this statement on the grounds that it was irrelevant and beyond the scope of Siddons's direct testimony, and the district court allowed the evidence to come in, stating "nothing outside of cross after this."

Reed's defense consisted of testimony by his co-defendant, Solomon. Solomon testified that all five firearms belonged to him, and that when the jeep was stopped by police, all five firearms were near him on the rear floor board. He also testified that he did not have a Crown Royal bag and that he did not slide anything under the seat.

C. The Verdict and Reed's Sentence

At the conclusion of the trial, the jury found Reed guilty of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and Bolden and Larry Bushnell guilty of their respective charges. As an armed career criminal under 18 U.S.C. § 924e(1), Reed was sentenced by the district court to

212 months in prison and five years of supervised release on August 15, 2005. He appeals.

II. Discussion

Reed argues that: (1) the evidence was insufficient to support a jury finding that he possessed a firearm beyond a reasonable doubt; (2) the district court abused its discretion in admitting testimony on redirect examination regarding a statement he made to Siddons during the arrest; and (3) the district court clearly erred in denying his *Batson* challenge to the government's peremptory strikes.

A. Sufficiency of the Evidence

This court "review[s] a district court's denial of a motion for a judgment of acquittal *de novo*." *United States v. Ferguson*, 211 F.3d 878, 882 (5th Cir. 2000). In evaluating whether the evidence was sufficient to convict Reed, the court "must determine whether, viewing the evidence in the light most favorable to the verdict and drawing all reasonable inferences from the evidence in support of the verdict, a rational trier of fact could have found that the evidence established the essential elements of the offense beyond a reasonable doubt." *Id.* "The jury is free to choose among reasonable constructions of the evidence and the evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt." *Id.* "If, however, the evidence gives equal or nearly equal circumstantial support to a theory of guilt, as well as to a theory of innocence, the conviction must be reversed." *Id.* at 882-83.

To establish a violation of 18 U.S.C. § 922(g)(1), the government had the burden to prove three elements beyond a reasonable doubt: (1) that Reed had been convicted of a felony; (2) that he possessed a firearm; and (3) that the firearm traveled in or affected interstate commerce. *United States v. Fields*, 72 F.3d 1200, 1211 (5th Cir. 1996). Because the parties stipulated that all of the firearms were manufactured outside of Texas and that Reed was a convicted felon, Reed's challenge to the sufficiency of the evidence pertains only to the second element.

Possession of a firearm may be actual or constructive. *United States v. De Leon*, 170 F.3d 494, 496 (5th Cir. 1999). "Actual possession means the defendant knowingly has direct physical control over a thing at a given time." *United States v. Munoz*, 150 F.3d 401, 416 (5th Cir. 1998). "Constructive possession means ownership, dominion or control over a thing, or control over the premises where the thing is found." *Id.* When there is joint occupancy or presence at a location in which a weapon is found, such as here, this court applies a "'commonsense, fact-specific approach' [in] determining whether constructive possession was established." *United States v. Mergerson*, 4 F.3d 337, 349 (5th Cir. 1993) (quoting *United States v. Smith*, 930 F.2d 1081, 1086 (5th Cir. 1991)). The evidence must support "at least a plausible inference that the defendant had knowledge of and access to the illegal item." *United States v. Hinojosa*, 349 F.3d 200, 204 (5th Cir. 2003) (internal quotation marks and citation omitted).

"[M]ore evidence than mere physical proximity

of the defendant to the [firearm] is required." *United States v. McKnight*, 953 F.2d 898, 901 (5th Cir. 1992) (citation omitted). Nor is evidence that the defendant operated the vehicle, eluded the police, and made furtive movements near the location of the firearm, by itself, sufficient to establish constructive possession. *See United States v. Wright*, 24 F.3d 732, 735 (5th Cir. 1994). "[W]hile dominion over the vehicle certainly will help the government's case, it alone cannot establish constructive possession of a weapon found in the vehicle, particularly in the face of evidence that strongly suggests that somebody else exercised dominion and control over the weapon." *Id.* Rather, "something else (e.g., some circumstantial indicium of possession) is required besides mere joint occupancy ...." *Mergerson*, 4 F.3d at 349.

Applying these principles to the present case, the evidence was sufficient to establish that Reed constructively possessed the .357 revolver. First, Rolanda Bushnell testified that Reed and his co-defendants borrowed the car with no firearms inside it. Second, Siddons testified that when he stopped Reed, he observed both Reed and the driver reach towards the floor board (where both Reed and the driver had access to firearms). Third, when Reed was removed from the vehicle, the .357 revolver was found at his feet inside a Crown Royal bag. Finally, Solomon testified that he did not kick any firearms under the seat or hide any firearms in a Crown Royal bag.

Reed argues that this evidence, by itself, cannot establish constructive possession, particularly in light of the countervailing evidence (1) that the .357

revolver was not in plain view but inside the Crown Royal bag; (2) that there was no evidence that Reed handled the .357 revolver or the Crown Royal bag or had placed either in the jeep; and (3) that Solomon testified that all five guns belonged to him. Reed further argues that his statement regarding a robbery, as testified to by Siddons, is unclear; that nothing links the .357 revolver to a robbery or to Reed's unspecified efforts to keep someone from getting killed; and that any inference from the statement to a conclusion that Reed had knowledge of the .357 revolver is too remote.[3]

Contrary to Reed's argument, his statement to Siddons constituted the requisite "circumstantial indicium of possession" – the "something else ... besides mere joint occupancy" – that, when taken together with the evidence of Reed's proximity to and furtive movements toward the .357 revolver, sufficiently proved constructive possession. He told Siddons that "he had just been robbed and that he was trying to keep the other guy from killing him – or keeping the other guy from killing a person." This statement, when viewed in the light most favorable to the verdict, indicated that Reed had knowledge of the .357 revolver and a self-defense or defense-of-others

---

[3]Reed also asserts that the subsequent disappearance of the Crown Royal bag means that the jury was never provided an opportunity to consider the actual evidence against him, and that as a result, the jury could not have found that he possessed the .357 revolver beyond a reasonable doubt. The trial testimony regarding the Crown Royal bag, however, was relevant only to show that the .357 revolver was not in plain view, a fact that does not alter the outcome of the analysis here.

motive for possessing it.

At the same time, Solomon's testimony regarding all five firearms being near him on the rear floor board was contradicted by Siddons's and Moore's testimony regarding where they found the firearms. After hearing this conflicting testimony, the jury was free to choose among reasonable constructions of the evidence. *See United States v. Ramos-Garcia*, 184 F.3d 463, 465 (5th Cir. 1999) ("We determine only whether the jury's decision was rational without passing on whether ... we believe it was the correct one ... [and] therefore must view the evidence in the light most favorable to the jury's verdict without second-guessing the weight or credibility given the evidence by the jury."). In addition, Solomon's alleged ownership of the firearms did not prevent Reed from constructively possessing the .357 revolver during the incident at issue. Accordingly, the evidence was sufficient to support the jury's finding that Reed possessed a firearm beyond a reasonable doubt.

B. Admission of Reed's Statement

Reed's challenge to the admission of his statement on Siddons's redirect examination is reviewed for abuse of discretion. *See United States v. Insaulgarat,* 378 F.3d 456, 464 (5th Cir. 2004). "A district court abuses its discretion if it bases its decision on an error of law or a clearly erroneous assessment of the evidence." *Id.* (citation omitted). It is generally true, as Reed argues, that the scope of cross examination cannot exceed the scope of direct examination, *id.* at 465 n.12, and that this principle

applies to redirect examination as well. *See United States v. Reliford*, 210 F.3d 285, 305 (5th Cir.), *vacated on other grounds sub nom. Clinton v. United States*, 531 U.S. 920 (2000).

Federal Rule of Evidence 611(a), however, provides the district court with substantial discretion to manage the examination of witnesses at trial:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Fed. R. Evid. 611(a). Here, the district court properly exercised its discretion under Rule 611(a) to allow the prosecutor, on redirect examination of Siddons, to inquire into the statement made by Reed that "he had just been robbed and that he was trying to keep the other guy from killing him – or keeping the other guy from killing a person." *See also Feutralle v. United States*, 209 F.2d 159, 162 (5th Cir. 1954) ("Considerable discretion is allowed the trial court in the manner in which the examination of witnesses shall be conducted.").

Indeed, Reed cites no authority to the contrary.[4] He suggests instead that the probative value of the statement was outweighed by the prospect of confusion and prejudice. *See* 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 611.03[4](a) (2d ed. 1997) (explaining that under Rule 611, a district court balances "the factors of prejudice, confusion, and delay against the probative value of the testimony" in deciding whether to limit cross examination). But that argument, too, is unavailing. Reed's statement was highly probative because it indicated that he had knowledge of the .357 revolver and a motive for possessing it; and admission of the statement was not overly prejudicial or confusing because it provided no detailed insight or unnecessary digression into the events that occurred before the police arrived (discussion of which the district court had prohibited) beyond a basis for that knowledge and motive.[5] Accordingly, the district court properly

---

[4]Reed's reliance on Federal Rule of Evidence 611(b) is misplaced. Although the rule provides that "[c]ross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness," it also contains the caveat that "[t]he court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." Fed. R. Evid. 611(b). If the court has such discretion on cross examination, then it follows logically that the court has similar discretion on redirect examination.

[5]The government also points out that, even if it had not offered this testimony during its case-in-chief, it could have waited until its rebuttal case, called Siddons back to the stand, and used the testimony to rebut Solomon's testimony that he possessed all five firearms. Accordingly, efficiency interests support the district court's exercise of discretion to permit the challenged testimony

exercised its discretion in admitting Siddons's testimony on redirect examination regarding Reed's statement.

C. Batson *Challenge*

The district court's denial of Reed's *Batson* challenge is reviewed for clear error and "is entitled to great deference, since findings in this context largely turn on an evaluation of the credibility or demeanor of the attorney who exercises the challenge." *United States v. Bentley-Smith*, 2 F.3d 1368, 1372-73 (5th Cir. 1993).

"[A] prosecutor violates the equal protection clause when he strikes veniremen of the defendant's race based on the assumption that they would be lenient toward the defendant because of race." *United States v. De La Rosa*, 911 F.2d 985, 990 (5th Cir. 1990). *Batson v. Kentucky*, 476 U.S. 79 (1986), sets forth a three-step inquiry for a defendant's challenge to a peremptory strike based on race. "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.'" *Johnson v. California,* 545 U.S. 162, 168 (2005) (quoting *Batson*, 476 U.S. at 93-94). "Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes." *Id.* (quoting *Batson*, 476 U.S. at 94). "Third, '[i]f a

---

on redirect examination as well.

race-neutral explanation is tendered, the trial court must then decide ... whether the opponent of the strike has proved purposeful racial discrimination.'" *Id.* (quoting *Purkett v. Elem*, 514 U.S. 765, 767 (1995) (per curiam)).

Here, the government concedes that "the district court found that the defendants met the first prong." The burden thus shifted to the prosecutor to come forward with a race-neutral explanation for each strike. *Id.* at 168. The Supreme Court has explained that:

> [a] neutral explanation ... means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.

Hernandez v. New York, 500 U.S. 352, 360 (1991). The government met this burden when it explained that one of the African-American venire members had indicated that "he didn't really want to be here because ... he was missing work" and that the other had said that "he had a problem with the Harris County Sheriff's officers" – reasons that facially had nothing to do with race.[6]

---

[6]Although Reed asserts that the government misquoted the prospective jurors when explaining its non-discriminatory reasons, the record indicates that the prosecutor fairly

As a result, the issue centers on the third step – whether the district court decided if Reed had proved purposeful racial discrimination. *Johnson*, 545 U.S. at 168. On this point, Reed argues that "the record is completely barren of any reasoning or analysis by the district court, which simply declared the *Batson* challenges overruled," and that therefore the court "fail[ed] to adhere to its obligation ... and failed to apply the correct legal standard to determining the challenge to the ... peremptory strikes." In addition, Reed asserts that "the district court actually substituted its own (inadequate) reasons for those the Government offered."

These arguments lack merit. First, after the prosecutor offered the race-neutral justifications for the strikes, defense counsel responded, "[o]kay." The court then asked if there were any other challenged

---

paraphrased their statements. In addition, although Reed argues that the Supreme Court's recent decision in *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008), illustrates the inadequacy of the government's proffered reasons, that case is distinguishable. In *Snyder*, the Court held that the prosecutor's proffered reasons for striking an African-American juror were pretext for racial discrimination. *Id.* at 1212. The first reason, the juror's nervousness, was insufficient by itself because the record materials could not convey the juror's demeanor absent a specific finding by the trial judge; and the second reason, the juror's student-teaching obligations, failed because it appeared speculative and implausible in light of the brevity of the trial and of the prosecutor's acceptance of white jurors who disclosed conflicting obligations that appeared at least as serious. *Id.* at 1209-12. Here, however, neither of the government's proffered reasons centered on a juror's demeanor or appeared implausible in comparison with accepted jurors' responses.

strikes; and after defense counsel said, "[t]hat's all," the court overruled the *Batson* motion. With this concession and with no additional evidence of discrimination, the district court's overruling of the *Batson* motion adequately conveyed its decision that Reed had failed to prove purposeful racial discrimination, and Reed has not cited any authority that requires a more specific, express indication of that decision beyond what was given.

Second, Reed's characterization of the district court substituting its own race-neutral reasons for those of the government is inaccurate. By the time Bolden's counsel, following the government's case-in-chief, clarified for the record that "the jury panel ha[d] no African-Americans," the district court had long concluded the *Batson* analysis and overruled the motion. Reed cannot challenge that ruling now based on the district court's comments later in the proceeding. Accordingly, the district court properly denied Reed's *Batson* challenge to the government's peremptory strikes.

III. Conclusion

Finding the evidence sufficient to support Reed's conviction for being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and finding no error in the district court's challenged rulings, we AFFIRM.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[DATE STAMP]
United States Court of Appeals
Fifth Circuit
FILED
May 1, 2008
Charles R. Fulbruge III
Clerk

No. 05-20712
D.C. Docket No. 4:04-CR-429-3

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

KEITH RAYE REED
Defendant - Appellant

Appeal from the United States District Court for the Southern District of Texas, Houston.

Before KING, WIENER, and ELROD, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

ISSUED AS MANDATE: JUN 06 2008

A True Copy
Attest
Clerk, U.S. Court of Appeals, Fifth Circuit
By: /s/_____
Deputy

New Orleans, Louisiana JUN 06 2008

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-20712

[DATE STAMP]
U.S. COURT OF APPEALS
FILED
MAY 29 2008
CHARLES R. FULBRUGE III
CLERK

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

KEITH RAYE REED
Defendant - Appellant

Appeal from the United States District Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

Before KING, WIENER and ELROD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/_____
UNITED STATES DISTRICT COURT JUDGE